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Investment and environmental protection in the United States-Mexico-Canada Agreement: pathways toward sustainable development

Inversión y protección ambiental en el Tratado entre México, Estados Unidos y Canadá: rutas hacia un desarrollo sustentable

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Abstract

The article examines the tension between foreign investment protection (Chapter 14) and environmental protection (Chapter 24) under the United States-Mexico-Canada Agreement (USMCA), with the aim of uncovering the significant asymmetries embedded in dispute settlement mechanisms and in the relative standing of different actors. The article further argues that the international investment protection regime reinforces these asymmetries by privileging capital over the State's regulatory capacity. From a systemic perspective, the capital-nature tension is analyzed as the result of feedback dynamics between two functionally differentiated subsystems: the economic subsystem, oriented toward capital accumulation, and the environmental subsystem, where environmental protection is pursued through regulatory frameworks and sustainability policies. This study identifies several proposals for reforming the investment protection regime which, if applied to the USMCA—such as strengthened right-to-regulate clauses, minimum standards linked to human rights, effective third-party participation, and codes of conduct for arbitrators—could help rebalance the relationship between investment and environmental protection, reduce systemic tensions, address institutional gaps, and redirect development toward sustainability.

Keywords: Foreign investment, environmental protection, international investment regime, sustainable development.

Resumen

El artículo examina la tensión entre la protección de la inversión extranjera (Capítulo 14) y la protección del medio ambiente (Capítulo 24) en el marco del Tratado entre México, Estados Unidos y Canadá (T-MEC), con el objetivo de develar las marcadas asimetrías en los mecanismos de solución de controversias y en la posición relativa de los distintos actores. El artículo sostiene que el régimen internacional de protección de inversiones refuerza estas asimetrías al privilegiar al capital por encima de la capacidad regulatoria del Estado. Desde una perspectiva sistémica, la tensión entre capital y naturaleza se analiza como dinámicas de retroalimentación entre dos subsistemas funcionalmente diferenciados: el subsistema económico, orientado hacia la acumulación de capital, y el subsistema ambiental, en el que la protección del medio ambiente se persigue mediante marcos regulatorios y políticas de sustentabilidad. El estudio identifica diversas propuestas de reforma al régimen de protección de inversiones que, aplicadas al T-MEC —como el fortalecimiento de las cláusulas relativas al derecho a regular, el establecimiento de estándares mínimos vinculados con los derechos humanos, una participación efectiva de terceros y la adopción de códigos de conducta para los árbitros— podrían contribuir a reequilibrar la relación entre la protección de las inversiones y la protección ambiental, reducir las tensiones sistémicas, llenar vacíos institucionales y reorientar el desarrollo hacia la sustentabilidad.

Palabras clave: Inversión extranjera, protección ambiental, régimen internacional de protección de inversiones, desarrollo sustentable.

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Introduction

One of the most significant structural changes introduced during the renegotiation of the trade agreement among the North American countries, which resulted in the United States–Mexico–Canada Agreement (USMCA), was the increased emphasis on environmental issues. These issues were elevated from a side agreement under NAFTA to a central chapter of the treaty, subject to the general state-to-state dispute settlement mechanism as well as the citizen submission mechanism. A separate chapter devoted exclusively to environmental matters, Chapter 24, was established. Although this chapter incorporated provisions on environmental cooperation, its substantive content and, above all, its scope are not considered genuinely innovative, since these provisions had already been included in the parallel environmental agreement during the NAFTA era (Antal, 2021).

During the same renegotiation process, the investment chapter also underwent several modifications. On the one hand, these changes restricted investor protections; on the other, they preserved the privileges enjoyed by U.S. businesses with investments in strategic sectors in Mexico, such as energy. This resulted in an institutional architecture characterized by contrasts and inconsistencies between trade and environmental policies. The USMCA investment chapter retains the World Bank's International Centre for Settlement of Investment Disputes (ICSID) as an international arbitration forum for investor-state dispute settlement. Such disputes frequently involve a confrontation between the state's regulatory authority (particularly that of Mexico) in a given area and the rights of investors (from the United States) (García Sánchez, 2023). As Echaide (2018) points out, "[t]his creates an imbalance in the relationship between the public and private spheres in favor of the latter, which, at the international level, translates into a reduction in the power of states as central actors in international relations" (p. 146).

Analyzing the treaty from a systemic perspective makes it possible to examine critically the relationship between key chapters, such as those on investment and the environment, which are generally reviewed

separately and independently. This fragmented approach makes it difficult to identify structural weaknesses in the treaty that create challenges for interpreting its chapters and provisions and ensuring their full implementation and monitoring. Drawing on systemic perspectives and concepts such as the capital–nature tension, functional differentiation, and structural couplings, and building on the work of classical theorists such as David Harvey and Niklas Luhmann, alongside other scholars including Mathias Albert, Barry Buzan, Michael Zürn, and Juan José Franco-Cuervo, this study identifies the tension between capital and nature within the framework of international economic law in the context of the USMCA. It does so by examining provisions in the treaty's environmental and investment chapters while demonstrating how the body of rules and institutions designed to defend and protect foreign investment and its interests—known as the International Investment Protection Regime (IIPR)—contributes to perpetuating the structural weaknesses of the North American trade agreement.

The central objective of this article is to critically analyze the structural tensions and asymmetries between investment protection and environmental protection under the USMCA, with a view to formulating normative proposals that would help restore balance and strengthen the integration of sustainable development into the agreement. From an interdisciplinary perspective, the study addresses a contemporary issue involving international economic governance, international relations, and regulation, contributing to the identification and analysis of the challenges involved in reconciling investment, environmental protection, and sustainable development in North America.

The normative proposals presented in this article draw on research concerning reform of the international investment protection regime conducted by multilateral organizations and international think tanks and published between 2019 and 2024. These publications offer a range of proposals for reforming the international investment protection regime. They include the policy brief *Third Party Rights in Investor-State Dispute Settlement*, prepared in 2019 by the Columbia Center on Sustainable Investment, the

International Institute for Environment and Development, and the International Institute for Sustainable Development (Coleman et al., 2019); the technical policy report International Investment Agreement Reform Accelerator (United Nations Conference on Trade and Development [UNCTAD], 2020); the international policy research and analysis report prepared for the G20, Mapping Sustainable Development and Investment Facilitation Provisions in IIAs Concluded by G20 Members and Invited Countries (UNCTAD & Organization for Economic Cooperation and Development [OECD], 2024); and the collection of policy documents produced by Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), under the initiative known as Investor-State Dispute Settlement Reform (UNCITRAL, 2026). These publications emphasize the need to transform the IIPR through normative amendments to trade agreements containing investment protection provisions or clauses. They are therefore particularly relevant to the analysis and proposals developed in this article.

The article is organized into five sections. The first examines capital–nature tensions from a theoretical and methodological perspective, while the second applies this understanding to the framework of the USMCA. The third section analyzes the IIPR as a contributing factor to these tensions, as well as the demands for reform of this regime. The fourth section presents several proposals put forward by international organizations to reform the IIPR and examines how incorporating them into the USMCA could help alleviate the capital–nature tension and its various manifestations, thereby promoting a more coherent paradigm of sustainable economic development. Finally, the conclusions reflect on current political conditions and discuss the strengths and limitations of the research presented in this article.

Methodology

This research adopts a qualitative approach. Drawing on a systemic perspective and complex thinking, it interprets the capital–nature tension reflected in the institutional design of the United States–Mexico–Canada Agreement (USMCA). A case study was conducted by comparing the treaty's investment

chapter (Chapter 14) and environmental chapter (Chapter 24). The case was selected for four historical and political reasons: the coexistence, within a single legal instrument, of investment and environmental obligations supported by protection mechanisms that differ in strength and scope; the treaty's status as a historically replicated model of the international investment protection regime; the concentration of investor-State claims against Mexico within the region; and, finally, the scheduled review of the treaty in 2026.

The analysis was conducted in two phases. The first focuses on a systemic comparison of the provisions of both chapters through three analytical categories— asymmetry, contradiction, and regulatory gaps— which are discussed in the following paragraphs, in order to identify the various manifestations of the capital–nature tension. The second phase identifies proposals for reforming the International Investment Protection Regime (IIPR) and draws on the concept of structural coupling to highlight the potential for incorporating these reform proposals into the treaty's text to mitigate the manifestations of this tension.

Three types of information were collected: primary legal and regulatory sources, including the official text of the USMCA and documents concerning reform of the IIPR issued by the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD), and the International Centre for Settlement of Investment Disputes (ICSID); contextual quantitative data obtained from official databases maintained by specialized organizations, including the ICSID case registry, trade statistics from Mexico's Ministry of Economy, and reports published by UNCTAD and the Transnational Institute think tank; and specialized academic literature on international investment law, environmental law, and systems theory. The four documentary sources from which the reform proposals were drawn were selected because they originated from multilateral organizations or think tanks with extensive, well-documented work on the IIPR, as well as for their relevance to current developments and their formulation of proposals from environmental and human rights perspectives.

The following paragraphs present the theoretical framework for examining the capital–nature tension and its manifestations within the USMCA through a systemic analysis. To this end, the study draws on concepts from general social systems theory and complex thinking, advancing the premise that the capital–nature tension results from feedback dynamics between two functionally differentiated systems: the economic system, oriented toward capital accumulation, and the environmental system, whose protection is pursued through often weak regulations and national and international environmental sustainability policies. These dynamics generate asymmetries, contradictions, and regulatory gaps in the treaty's institutional design, revealing both the limitations of the prevailing development model in terms of sustainability and the state's capacity to manage public goods.

To understand the capital–nature tension, it is useful to distinguish between two analytical dimensions. The first concerns capital's capacity to internalize nature through commodification. Drawing on Polanyi, Harvey (2014) observes that capitalism, from its very beginnings, transformed land, labor, and money into commodities. Following this logic, capital creates carbon markets, commodifies water through futures contracts, acquires land and rights to exploit and benefit from biodiversity, and engages in activities aimed at transforming common goods into tradable assets subject to financial speculation. In other words, this process entails the financialization of nature. Within the framework of the USMCA, this is reflected in the ability of investors in extractive industries—mining, energy, and hydrocarbons—to bring claims against host states when environmental regulations affect their profit expectations. Nature—water, subsoil resources, and biodiversity—thus becomes a financial asset, without access to protection before international tribunals against private interests.

The second analytical dimension concerns the notion that investment and environmental sustainability constitute functionally differentiated subsystems. Functional differentiation "is that in which subsystems are defined by the coherence of particular types of activity and by their differentiation from other types of activity..." (Albert et al., 2013, p. 2). In other words,

social organization is based on the functions performed by each subsystem—politics, law, economics, and science—each operating according to its own code, as explained by Luhmann (cited in Albert, 2004), and on the relationships among these subsystems.

Tensions and conflicts emerge when the differentiated functions of two or more subsystems clash or even contradict one another as they interact within a specific context. A clear example can be found within the framework of the USMCA, where the investment protections established in Chapter 14 come into direct conflict with investor-state disputes arising from environmental regulations. By restricting foreign investment, such regulations generate friction among the various interests involved.

The underlying cause of this confrontation lies in the fact that investment protection primarily serves private interests, seeking to safeguard investors' rights and expectations. Environmental regulation, by contrast, operates in the public interest, prioritizing the protection and preservation of the natural environment through policies and legal provisions that may restrict certain economic activities or investments. This opposition between private and public interests lies at the heart of the systemic conflict characterizing the relationship between the USMCA's investment and environmental chapters.

Coordination among the differentiated functions of subsystems—economics, law, politics, science, and others—is possible through forms of structural coupling, which allow tensions within one subsystem to be reduced through the assimilation of information from another subsystem. As Franco-Cuervo (2024) explains:

"Coupling may occur when one system attaches itself to another system in order to survive, or when a system considers something in its environment relevant and adopts it. In both cases, it is understood that a certain degree of interpenetration occurs between one system or environment and another system, although these systems

continue to operate independently, according to their own rules..." (p. 64).

Structural coupling thus enables the selective integration of elements from functionally differentiated subsystems. In this article, the concept is used to explain how normative elements derived from proposals by multilateral organizations to reform the IIPR can be selectively incorporated into the regulatory framework governing trade in North America, namely, the USMCA.

Results

Manifestations of the Capital–Nature Tension in the USMCA

The capital–nature tension within the United States–Mexico–Canada Agreement (USMCA) is examined by comparing the provisions established in its investment and environmental chapters. This tension is considered to manifest itself in two asymmetries, one contradiction, and one regulatory gap. The asymmetries identified concern the hierarchy among the actors directly involved in investor-state disputes, as well as the environmental submission procedure concerning the enforcement of environmental legislation under the USMCA. The contradiction points to a normative inconsistency between the investment and environmental chapters. Finally, the regulatory gap refers to the absence of a mechanism for balancing investors' rights against state environmental regulations.

a) Asymmetry Among Actors: Investors and Involved Third Parties

A comparison of the provisions of the investment and environmental chapters reveals two asymmetries directly related to the unequal hierarchical positioning of different categories of actors and, consequently, the interests they represent.

The first asymmetry concerns the hierarchy among actors: states, investors, and civil society. Beysulen Angin (2025) analyzes the conflict that emerges when states' right to regulate clashes with investment protection provisions in investor-state disputes, identifying the absence of public interest considerations in the dispute settlement mechanisms

established under investment agreements and treaties as one of its causes. These mechanisms operate as arenas of direct confrontation between states and investors, where competing rights come into conflict: investors' rights to protect their capital and states' right to regulate. Both the disputes themselves and the resulting arbitral awards affect workers, local communities, and consumers, all of whom ultimately lack a legally recognized right to participate in these proceedings.

The USMCA has incorporated the *amicus curiae* mechanism to allow interested third parties to submit written observations, as established in Article 14.D.7 on the Conduct of Arbitration:

After consulting the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties, from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings. (Secretaría de Economía, 2019a, pp. 1033–1034)

The *amicus curiae* mechanism has been presented merely as an opportunity for interested third parties to submit comments during arbitration proceedings. It appears to be a gesture toward inclusion, insofar as it allows such comments to be received and considered. Nevertheless, from a human rights perspective, this mechanism is actually exclusionary in terms of rights, as Deva and Van Ho (2023) argue:

[...] by relegating affected third parties to the status of 'amicus' rather than parties to the case, the procedure denies other rights holders access to an effective remedy. Taken together, these privileges deny the equality of rights required by international human rights law (IHRL) in remedial proceedings⁽¹⁾. (p. 420)

In many investor-state disputes, the rights of interested third parties—typically company employees and residents of communities where investment projects are carried out—are directly affected by private exploitation of natural resources. In this regard, the designation "interested third parties" is inappropriate, since these individuals are directly involved insofar as their rights are violated by the operation of projects associated with foreign investment.

By contrast, Chapter 14 of the USMCA grants investors a series of rights, including national treatment, most-favored-nation treatment, protection against expropriation, and the free transfer of capital. These provisions enable investors to initiate claims through international arbitration, whose awards can have significant consequences for the state's regulatory capacity while also imposing a substantial financial burden on public expenditure. In the case of the USMCA, these rights are designed to protect investments made by U.S. businesses in specific sectors considered strategically important to the United States within Mexico (Lai, 2021).

The notion that interested third parties are not recognized as rights holders is further reinforced by the procedure for submissions concerning the enforcement of environmental laws (Chapter 24.27). This mechanism, which forms part of the Commission for Environmental Cooperation, allows individuals, organizations, and even businesses to report failures by states to effectively enforce their environmental legislation. When an individual, organization, or business files a submission concerning environmental law enforcement under this procedure, the issue examined is not whether the treaty itself has been directly violated, but whether the state concerned has failed to fulfill a regional obligation of conduct, namely, the effective enforcement of its own laws.

The USMCA's environmental citizen submission procedure does not impose legal or trade sanctions on states found to have failed to enforce environmental legislation. Rather, it operates as a mechanism of regional scrutiny through the preparation and publication of factual records that may call into question the reputation of the states concerned. By

contrast, investor-state dispute settlement under the USMCA can result in financial penalties against states when arbitral awards favor investors. In other words, while the USMCA establishes a procedure to protect investors' rights, individuals whose human rights—including the right to a healthy environment—are violated by the operations of companies owning foreign investments have no comparable access to justice and, consequently, to remedies for the harm suffered.

These asymmetries demonstrate that the public interest in environmental matters is undermined in two ways: when the public interest conflicts with the rights of U.S. investors, as reflected in the provisions of Chapter 14, and through the absence of legal or trade sanctions when states fail to fulfill their environmental obligations.

b) Normative Contradiction: Mutually Exclusive State Obligations

The first contradiction emerges from the comparison between the provisions of Chapter 24 and those of Chapter 14. On the one hand, Chapter 24 establishes obligations for states to comply with and strengthen environmental regulations, including maintaining and enforcing domestic environmental laws, refraining from weakening them to attract trade or investment, and ensuring cooperation among countries. These obligations cover specific areas such as forest management, wildlife conservation, and biodiversity protection. The chapter also stipulates that States must not relax or fail to enforce their environmental laws to attract foreign investment or benefit domestic companies, thereby allowing them to compete unfairly with companies from the other two countries that must comply with environmental standards (Mitchell & Munro, 2019). As stated in the first paragraph of Article 24.4:

"No Party shall fail to effectively enforce its environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties." (Secretaría de Economía, 2019b, p. 3)

On the other hand, Chapter 14 (Annexes 14-D and 14-E) allows U.S. investors to indirectly challenge environmental regulations under national treatment or expropriation provisions, alleging that the state has violated its obligations concerning foreign investment. This constitutes the central contradiction in the relationship between investment and the environment, since each chapter separately establishes potentially mutually exclusive obligations for the states party to the agreement: complying with domestic environmental legislation while simultaneously fulfilling their obligations toward foreign investors.

The central dilemma is therefore: which of these two obligations should prevail in the event of a conflict? Comparing Chapters 24 and 14 reveals an ambiguous institutional architecture governed by competing rationales, creating fertile ground for conflicts that, under a strict application of the relevant provisions, appear irreconcilable. If Mexico strengthens environmental regulations to comply with its domestic laws and Chapter 24, it may generate disputes with investors that are subsequently brought before international arbitral tribunals.

The problem posed by these potentially mutually exclusive state obligations lies in the absence of a clearly established hierarchy between public and private interests (He & Zhao, 2025). According to Giest (2017), conflicts arise under investment agreements because:

"...most bilateral investment treaties (BITs) are imprecise as to what constitutes legitimate action, leaving tribunals with little guidance on how to balance the competing interests of the state and the investor, and the extent to which the state's interests should be subjected to scrutiny." ⁽²⁾ (p. 336)

In the absence of a balancing mechanism, fundamental questions persist in international investment and environmental law, including how to determine which interest should prevail in disputes involving USMCA member states. When such disputes reach international arbitral tribunals, the task of balancing these interests falls to bodies whose track

record reveals a clear pro-investor bias (Echaide, 2018; UNCTAD, 2024a).

c) Regulatory Gap: A Treaty Without Balancing Mechanisms

The USMCA does not establish clear criteria for determining when an environmental measure constitutes legitimate regulation and when it should be considered indirect expropriation or a violation of the fair and equitable treatment standard. Unless these criteria are explicitly incorporated into the USMCA or its investor-state dispute settlement mechanisms, decisions will continue to be made by arbitral tribunals applying discretionary criteria that may differ from one case to another (Beysulen Angin, 2025).

Furthermore, the absence of explicit climate change provisions in the USMCA and its dispute settlement mechanisms contributes to the ambiguity described above. Chapter 24 failed to incorporate explicit climate change obligations, partly because of the policies pursued during Donald Trump's first administration, which promoted protectionist measures and an agenda of climate change denial (Stevens & Sánchez Ramírez, 2022).

Although Chapter 24 covers a considerably broader range of areas than its predecessor under NAFTA, it contains no explicit, binding obligations for states concerning the elimination of fossil fuel subsidies, decarbonization, the energy transition, or emissions reductions. Such issues may be perceived as obstacles during trade agreement negotiations (Stevens & Sánchez Ramírez, 2022; Quintana Solórzano, 2017).

Similarly, the absence of climate change clauses prevents conflicts between the protection of fossil fuel investments and climate policies from being addressed through an established institutional framework.

At the same time, environmental policies remain essentially within national jurisdiction, without sufficient regional integration or a regional perspective, and without legally binding mechanisms to counteract regressive policy changes, such as those observed in U.S. climate policy under the second Trump administration. This is because

Chapter 24 is structured around commitments to voluntary cooperation.

The International Investment Protection Regime: Legal Terrorism and Reform Proposals

The International Investment Protection Regime (IIPR) comprises the agreements, practices, and mechanisms—such as the investor-state dispute settlement system—that regulate relations between transnational corporations and host states receiving foreign investment through bilateral investment treaties or trade agreements containing investment protection and international arbitration provisions (Haces & Sánchez, 2016). During the 1990s and 2000s, the IIPR achieved a high degree of institutionalization through the signing of numerous investment agreements worldwide. However, its prominence has declined over the past decade. According to a UNCTAD study (2025), the period with the highest number of investment agreements signed was between 1990 and 2010. During those two decades, 2,543 agreements were signed and entered into force, representing 76% of all agreements signed between 1956 and 2024. From 2011 to 2024, the number of new investment agreements signed declined steadily. Despite this trend, the IIPR remains relevant and continues to pose risks for developing countries, since most claims are brought against middle-income states where transnational corporations headquartered in developed countries operate. A recent study by the Transnational Institute (Müller & Ghiotto, 2024) on the IIPR in Latin America and the Caribbean (LAC), using data through December 2023, highlights both the regime's impact on the region and the pronounced imbalance in its operation:

LAC accounts for 28.5% of all known claims worldwide, making it the second most frequently sued region in the world; 86% of claims were initiated by U.S., Canadian, and European investors; 22.4% of all claims are related to mining, gas, and oil ⁽³⁾; investors have prevailed in 60% of resolved cases; governments have been ordered to pay foreign investors

a total of US\$33.629 billion. This figure is one-third higher than the cost of climate-related disasters in the region between 1970 and 2021 and exceeds the total foreign direct investment received in 2022 by the six Central American countries, the 15 Caribbean countries, Uruguay, Paraguay, and Ecuador combined. (p. 2)

The high number of investor-state disputes involving the extractive and energy industries raises a crucial debate concerning natural resource management policies in developing countries in relation to foreign investment, with direct implications for climate change. According to the Global ISDS Tracker (2026), "...of the 20 cases involving the largest compensation awards, most are related to fossil fuels"⁽⁴⁾, a sector operating predominantly in the Global South. This is particularly serious because companies from the Global North, in addition to benefiting from the exploitation of these resources, can bring claims against states when domestic regulations affect their investments, demanding compensation that places substantial financial burdens on developing economies. Similarly, UNCTAD (2024b, November 26) notes that the amounts states must pay to companies following awards in their favor are comparable to the climate finance that developed nations provide to developing countries (Rowling & Civillini, May 29, 2024). The paradox is that while developed countries allocate resources to combat climate change in developing countries, the latter may be required to pay equivalent amounts in compensation to corporations that have brought claims against them. This tension is further aggravated by the fact that the sectors accounting for the largest number of investor-state claims are precisely the extractive and energy industries: fossil fuels, mining, and electricity generation.

Beyond their devastating legal and economic consequences for developing countries, these circumstances are also frequently detrimental to environmental regulations. This phenomenon has been described as "litigation terrorism" (Neslen, 2024) or "legal terrorism" (Stiglitz, 2025), given the large number of claims brought by investors in the extractive

sector, which is directly associated with large-scale environmental damage and, consequently, climate change. The IIPR thus operates as an instrument of litigation terrorism, enabling the exploitation of developing countries' public finances when their environmental regulations adversely affect investors.

These imbalances are partly caused by the way the IIPR operates as a global institutional and regulatory framework governing foreign investment that disregards information, dimensions, or areas indirectly related to investment, even though they are affected by it (Echaide, 2018). Some criticisms of the IIPR raise ethical concerns regarding the exclusion of considerations such as human rights and environmental sustainability from investor-state disputes.

For several years, certain multilateral organizations have been conducting analyses and developing proposals to reform the IIPR⁽⁵⁾. These proposals include procedural changes to international arbitration mechanisms for dispute settlement, as well as amendments to investment agreements between countries aimed at incorporating concepts, information, materials, and proposals concerning human rights and environmental sustainability.

The debate on IIPR reform is therefore taking place in three multilateral forums: the United Nations Commission on International Trade Law (UNCITRAL), through Working Group III; the International Centre for Settlement of Investment Disputes (ICSID); and the United Nations Conference on Trade and Development (UNCTAD). Within UNCITRAL⁽⁶⁾, states have been discussing a structural reform agenda for the IIPR since 2017, encompassing a broad range of proposals, particularly concerning the design of dispute settlement mechanisms and procedures. The proposals are at different stages of discussion and implementation. For example, the new Code of Conduct for Arbitrators was published in 2023, the Advisory Centre is in the process of implementation, while the establishment of an appellate mechanism and a permanent multilateral investment court remain under discussion among UNCITRAL member states.

ICSID, which forms part of the World Bank Group, has undertaken the most comprehensive reform of its

rules since they first entered into force in 1966. This process culminated in amendments that took effect on July 1, 2022, introducing new provisions governing arbitration proceedings⁽⁷⁾. UNCTAD, for its part, has focused the debate on amending international investment treaties. Its publication *International Investment Agreement Reform Accelerator* (UNCTAD, 2020), released in 2020, emphasizes the need to reconsider central concepts in investment treaties, such as national treatment, most-favored-nation treatment, and indirect expropriation—all of which are included in the USMCA. The original concepts that continue to govern investment treaties were formulated during the 1990s and the first decade of the twentieth century, whereas today's priorities differ from those of a quarter of a century ago.

UNCTAD (2020) argues that contemporary investor-state disputes require a reinterpretation of the original concepts developed in the 1990s, since these are insufficient to address current social and environmental challenges. The organization emphasizes that "[...] all ISDS [Investor-State Dispute Settlement] cases initiated in 2019, as well as 99 percent of the total number of known cases—virtually all cases—were brought under treaties concluded before 2012" (p. 2). This finding reveals an important phenomenon: claims initiated while an investment agreement is in force may continue even after that agreement has been terminated. Consequently, outdated legal concepts remain operative through ongoing proceedings before arbitral tribunals. These older concepts are not only inadequate for addressing contemporary challenges but also have the potential to obstruct policies aimed at promoting the energy transition, mitigating climate change, and reducing carbon emissions.

The Mexican case illustrates this discrepancy. The year 2023 marked the deadline negotiated under the USMCA for investors to file claims pursuant to NAFTA provisions before the new regime took full effect. In that year alone, Mexico received 11 claims from U.S. and Canadian investors, out of a total of 37 active cases before ICSID.

More recent investment agreements have begun incorporating sustainability-related provisions,

including the state's right to regulate, the promotion of responsible and inclusive investment, environmental impact assessments, and broader issues such as cooperation on investment and climate matters or corporate social responsibility. However, despite this broader thematic scope, such provisions generally focus on relations between states without directly imposing obligations on investors (UNCTAD, 2025).

The IIPR is particularly relevant in the North American context for three reasons. The first, and perhaps most evident, is the intensity of trade and investment flows among the countries of the region, particularly between Mexico and the United States. U.S. investment accounted for 47% of foreign investment in Mexico; Mexico is one of the United States' principal trading partners, accounting for 15% of U.S. imports between January and August 2025 (Secretaría de Economía, 2025); and 83.2% of Mexico's total exports are destined for the United States (Secretaría de Economía, n.d.). These figures demonstrate that such a deeply integrated trade relationship inevitably generates tensions between foreign investment capital and natural resources and their management, particularly in Mexico.

The second reason for the IIPR's relevance concerns the institutional design of the USMCA, since the investment protection mechanism within its framework has been used more extensively against Mexico.

In the broader context, as of October 2025, investor-state cases before ICSID involving the countries of the region were distributed as follows: Mexico faced 37 claims (27 brought by U.S. companies and eight by Canadian companies); the United States faced eight claims (all brought by Canadian companies); and Canada faced 13 claims (all brought by U.S. companies). The third and final reason is that the IIPR was formally established within NAFTA as one of the first trade agreements to include provisions protecting foreign direct investment (Haces & Sánchez, 2016), thereby creating a model subsequently replicated in numerous bilateral investment agreements across different regions of the world.

In light of the foregoing, the 2026 review of the USMCA is significant beyond North America. The resulting configuration of the investment chapter—or

even the potential absence of the treaty itself—could serve as a model for future bilateral agreements, particularly amid the global proliferation of protectionist and nationalist policies. In the current political context, marked by the Trump administration's tariff war and tensions with Mexico over migration and security, central social issues in U.S.–Mexico relations, such as regional cooperation on human rights and environmental protection, have lost prominence. It is therefore imperative to contribute evidence-based analyses that can guide proposals toward a more balanced investment regime, one that takes human, community, and environmental rights into account. This article seeks to contribute to that objective.

The IIPR reforms currently under discussion and implementation follow two main directions: reforming the dispute settlement mechanisms of international organizations and reforming investment agreements themselves. The central criticism of the IIPR highlights the asymmetry between investors' rights—including protection against indirect expropriation, most-favored-nation treatment, and fair and equitable treatment—and the absence of clear social and environmental obligations. Against this background, the following section examines proposals for reforming the IIPR and the USMCA that could mitigate the capital–nature tension by incorporating issues and perspectives conducive to a paradigm more closely aligned with sustainability principles.

Discussion

Normative Couplings: Addressing the Capital–Nature Tension

In light of the systemic tensions identified between Chapters 14 (Investment) and 24 (Environment) of the United States–Mexico–Canada Agreement (USMCA), as well as ICSID practices in the North American context, this section examines how reforms to the International Investment Protection Regime (IIPR) could help rebalance, mitigate, and reconfigure the dynamics between environmental protection and investment under the agreement. Accordingly, several proposals are presented to address the asymmetries, contradiction, and regulatory gap identified as

manifestations of the capital–nature tension within the USMCA's institutional design.

a) Addressing Asymmetries: Amicus Curiae as a Right and Inclusive Mechanisms

This section presents potential normative couplings that could reduce the asymmetry among actors under Chapters 14 and 24 of the USMCA, as well as the disparity between the procedures for handling environmental complaints and investor-state claims.

In 2024, UNCTAD (UNCTAD & OECD, 2024) mapped the incorporation of sustainable development and investment facilitation provisions into investment agreements recently concluded by G20+ countries, particularly clauses concerning the right to regulate, the non-lowering of standards, responsible business conduct, and cooperation and inclusion mechanisms. Although these provisions have limited formal legal scope, their incorporation contrasts with older agreements, which largely disregard the public interest and the inclusion of actors other than states and investors. In this regard, UNCTAD identifies two avenues for making investment agreements more inclusive: recognizing the right to comment on investment projects and establishing mechanisms for dialogue with investors.

Regarding the right of any party to comment on investment projects, the proposal involves incorporating public hearing procedures into the investment chapter of a treaty or an investment agreement between countries, with the aim of reducing the disparity between the treatment of environmental complaints submitted by communities and investor-state claims. The right to comment on investment projects is established in Article 9 of the investment agreement between Japan and Angola. In the case of the USMCA, one possibility would be to integrate the National Contact Points, offices established under the OECD Guidelines for Multinational Enterprises. In principle, these offices provide a mechanism for submitting complaints concerning human rights violations arising from corporate projects undertaken by foreign investors. All three North American countries have a National Contact Point. Although these offices still operate with significant shortcomings, they constitute an existing

institutional infrastructure that could facilitate engagement between interested third parties and investors within the framework of Chapter 14 of the USMCA.

The document *Third Party Rights in Investor-State Dispute Settlement*, submitted by three think tanks⁽⁸⁾ (Coleman et al., 2019) to UNCITRAL Working Group III in 2019, explores participation mechanisms that go beyond amicus curiae, proposing the direct involvement of affected communities in investor-state proceedings, potentially even as a requirement for the admissibility of claims. The document urges that any new court or appellate body—both elements of UNCITRAL's proposed IIPR reforms—incorporate explicit procedures for the participation of local communities, NGOs, and other stakeholders, rather than leaving third-party participation to the discretion of arbitrators and the standard procedures of dispute settlement mechanisms.

Elevating *amicus curiae* participation to the status of a right, making this mechanism a requirement at the outset of arbitration proceedings, and enabling dialogue with investors through functional and autonomous mechanisms would provide greater recognition of interested third parties as actors directly involved in investor-state proceedings.

b) Addressing Mutually Exclusive State Obligations: Mainstreaming the Right to Regulate

The analysis of systemic tensions between specific provisions of the USMCA's investment and environmental chapters reveals a normative contradiction: Chapter 24 requires states to effectively enforce environmental laws, while Chapter 14 allows those same regulations to be challenged on the grounds that they violate investment obligations.

The USMCA explicitly recognizes the sovereign right of each state party to regulate in pursuit of legitimate public policy objectives. This right is established in the treaty's Preamble and in specific chapters, including Good Regulatory Practices (Chapter 28), Environment (Chapter 24), Investment (Chapter 14), and Energy (Chapter 8). Nevertheless, although this right is expressly recognized in the agreement, certain provisions, particularly those in Chapter 14, require

regulations to be non-discriminatory and based on scientific evidence when they affect trade in goods or services. These provisions are vague and open to interpretation and may therefore constrain the full exercise of the state's right to regulate. Ongoing reforms of the investor-state dispute settlement system, together with proposals to amend investment agreements, could help address and potentially balance commercial and environmental considerations in favor of the public interest.

Regulatory chill has been identified as a major problem for environmental regulation: the fear of litigation and multimillion-dollar awards can discourage the adoption of environmental protection measures, particularly in carbon-intensive sectors (UNCTAD, 2018). Proposals to reform the IIPR—including clauses reaffirming the right to regulate and explicit references to the Sustainable Development Goals—seek to reduce this deterrent effect on regulation. Furthermore, through its International Investment Agreement Reform Accelerator (UNCTAD, 2020), UNCTAD proposes safeguarding states' right to regulate by introducing specific exceptions when domestic regulations conflict with provisions of an investment agreement or treaty, including explicit references to climate objectives. These exceptions would serve as counterweights to provisions that could jeopardize the right to regulate, such as fair and equitable treatment, expropriation, and non-discrimination standards (Giest, 2017).

Although one of the difficulties surrounding the right to regulate lies in balancing private interests against the state's public interest and securing recognition of the latter by arbitral tribunals, recent investment agreements concluded by G20+ countries (UNCTAD & OECD, 2024) have incorporated sustainable development clauses, investment facilitation provisions aimed at promoting sustainable development and green economies, explicit recognition of the right to regulate, investor obligations concerning responsible conduct, and social participation mechanisms. These developments contrast with older treaties focused almost exclusively on investor protection and may provide useful references for balancing competing interests (Giest, 2017).

UNCITRAL has also developed proposals to ensure and safeguard the right to regulate. Under its workstream on Reform of Procedural Rules and Cross-Cutting Issues (UNCITRAL, 2024), it proposes a clause that gives precedence to states' right to regulate over any other treaty provision, without exceptions. This clause could be incorporated into investment agreements between states, providing greater clarity regarding the scope and limitations of investment agreements and leaving little room for vague interpretations. The proposed wording is as follows:

"Nothing in the agreement shall be interpreted as preventing the contracting parties from exercising their right to regulate and to adopt, maintain, and enforce any measure they consider appropriate to ensure that investments are carried out in a manner that takes into account the protection of public health, public safety, human rights, essential security interests, or the environment, the promotion and protection of cultural diversity, or ... No claim may be submitted if the measure alleged to constitute a breach of the agreement was adopted by the contracting State to protect public health, public safety, human rights, essential security interests, or the environment, or to promote and protect cultural diversity [...]" (pp. 11–12).

Although, by their very nature, state regulations in democratic systems should serve the public interest, when the state is subject to corporate capture, regulations—or delays in their design and implementation, or simply the absence of regulation—may instead serve private interests. In this context, the conduct of arbitrators in international dispute settlement mechanisms plays a central role. Arbitrators frequently come from the corporate sector and subsequently participate in international dispute settlement mechanisms. In some cases, the same individual may act as legal counsel for a company and later be appointed as an arbitrator in an investor-state

dispute (Echaide, 2018). Such circumstances may compromise the state's right to regulate by favoring the private interests with which arbitrators are associated. Consequently, the design and implementation of codes of conduct for arbitrators constitute an important means of safeguarding the right to regulate and, by extension, the public interest.

In this regard, ICSID introduced mandatory disclosure of third-party funding and other transparency measures in international arbitration proceedings in 2022. Subsequently, in 2023, UNCITRAL Working Group III adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution, Article 11 of which requires arbitrators to "disclose all circumstances that may give rise to justifiable doubts as to their independence or impartiality" (UNCITRAL, n.d., p. 4), including financial, professional, or personal relationships with the parties, their representatives, third-party funders, or other individuals with a direct or indirect interest in the outcome of the proceedings.

Various studies describe the IIPR as involving a partial transfer of power from public institutions to international investment arbitration tribunals, which can influence regulatory decisions through awards favoring companies in sensitive areas such as health, the environment, and the energy transition. In this context, arbitrators' impartiality when balancing public and private interests becomes crucial. Codes of conduct provide a means of assessing arbitrators who frequently come from the private sector and form part of what the literature has characterized as a transnational elite linked to the interests of developed countries (Tienhaara, 2009; Echaide, 2018). If arbitrators lack independence, the state's right to regulate becomes subject to criteria shaped by private interests with clear profit-making objectives.

c) Addressing the Regulatory Gap: Balancing the Public Interest in Environmental Protection Against Investment Protection

The central problem lies in the absence of institutionalized criteria for determining, within the framework of the USMCA and its investor-state dispute settlement mechanisms, when an environmental measure—including climate policies—

constitutes a legitimate exercise of the right to regulate and when it violates investment protection obligations. This lack of clarity grants arbitrators considerable discretion while creating the possibility of divergent awards in similar cases.

An analysis conducted by UNCTAD and the OECD (2024) of 62 investment agreements among G20+ countries⁽⁹⁾ reveals the systematic incorporation of provisions related to sustainable development. More than 90% of these agreements contain clauses preserving regulatory space for this purpose; approximately 74% include public policy exceptions for objectives such as health, environmental protection, or consumer protection, frequently combined with explicit right-to-regulate clauses emphasizing environmental protection. Approximately 56% prohibit the relaxation of environmental, health, or labor standards to attract investment, while one-third incorporate environmental cooperation commitments, sometimes through specific chapters with their own institutional mechanisms.

The report also highlights the whole-of-government approach found in recent treaties, which integrates investment governance, financial and technical support, and cooperation to attract sustainable investment. This model could serve as a reference for linking the USMCA's investment chapter with domestic environmental policies and the international climate commitments of North American countries.

Additionally, UNCTAD and the OECD (2024) propose placing sustainable development at the center of the debate on IIPR reform, making it a cross-cutting principle in the formulation of new clauses, the reformulation and reinterpretation of existing clauses and principles—such as most-favored-nation treatment and indirect expropriation—and even the elimination of certain concepts and principles from investment agreements. The aim is to achieve greater policy coherence between investment agreements and sustainable development. Although this proposal is conservative in the sense that it does not advocate abolishing the IIPR, it outlines a detailed path toward reforming the regime by modernizing investment agreements in line with international climate change policies.

Similarly, the document *International Investment Agreement Reform Accelerator* proposes model clauses aimed at strengthening coherence between investment and sustainable development. Specifically, it recommends linking the standards of "fair and equitable treatment" and "full protection and security" to minimum standards under international human rights and environmental law. It also proposes explicitly establishing that non-discriminatory measures adopted for public welfare purposes—including health, environmental protection, and safety—do not constitute expropriation, even when they adversely affect investors economically.

Conclusions

The objective of this article was to critically analyze the structural tensions and asymmetries between investment protection and environmental protection under the United States–Mexico–Canada Agreement (USMCA), with a view to formulating normative proposals that could help rebalance the integration of sustainable development into the treaty. A joint analysis of the investment (Chapter 14) and environmental (Chapter 24) chapters reveals a logical and normative tension between capital and nature. Chapter 14 is strongly pro-investor, supported by robust and effective international arbitration and enforcement mechanisms against states, whereas Chapter 24 is based on essentially voluntary cooperation commitments, lacks regional mechanisms for enforcing compliance, and does not recognize companies as actors bearing regional responsibility for the environmental damage associated with their operations. From the systemic perspective adopted in this study, the relationship between the two chapters was examined as a feedback dynamic between two functionally differentiated subsystems, revealing asymmetries, contradictions, and regulatory gaps as manifestations of the capital–nature tension.

The first phase of the analysis identified four specific manifestations of this tension: (1) two asymmetries, one among actors, since investors enjoy substantive rights and direct access to arbitration, while interested third parties are relegated to *amicus curiae* status; and another between procedures, since investor-state

claims frequently result in financial penalties imposed on states, particularly Mexico, whereas citizen submissions concerning environmental protection lead merely to reputational scrutiny; (2) a normative contradiction, insofar as Chapter 24 requires the enforcement of domestic environmental legislation, while Chapter 14 allows those same regulations to be challenged, without the treaty establishing which obligation should prevail; and (3) a regulatory gap, since the USMCA lacks clear criteria for distinguishing legitimate regulation from indirect expropriation and omits any reference to climate change. The analysis of the IIPR further demonstrated that these manifestations of the capital–nature tension are structural. The concentration of claims against Mexico within North America, the prominence of the extractive and energy sectors in investment disputes, and the continued application of international arbitration concepts and practices developed in the 1990s confirm that the IIPR perpetuates the treaty's weaknesses.

From the perspective of functional differentiation, investment and the environment operate as two distinct spheres, governed by different logics and languages, without clear rules for coordinating their activities. This differentiation becomes even more evident when investment and environmental regulation are addressed within the same trade agreement.

In the second phase of the analysis, developed in the discussion section, a normative coupling derived from IIPR reform proposals was identified for each manifestation of the tension. The capital–nature tension thus constitutes an arena of competing interests in which proposals and ongoing processes to reform the international investment protection regime within UNCITRAL, ICSID, and UNCTAD may function as normative couplings aimed at reorienting the relationship between investment and environmental protection. To address the asymmetries, the proposals include elevating *amicus curiae* participation to the status of a right and establishing inclusive mechanisms that enable substantive participation by interested third parties. To address the normative contradiction, they involve mainstreaming the right to regulate through explicit clauses granting

this right precedence over other treaty provisions, together with public policy exceptions for environmental and climate-related measures and ethical codes of conduct for arbitrators. Finally, to address the regulatory gap, they propose linking fair and equitable treatment standards to principles of international human rights law. Incorporating these legal options into treaty chapters or investment agreements could help reduce asymmetries, promote greater policy coherence in the face of normative contradictions, and fill legal gaps by providing clearer guidance for balancing investment protection against environmental protection, and private interests against the public interest.

Within the North American context, these proposals acquire strategic relevance given the intensity of trade and investment flows between Mexico and the United States. The normative couplings presented could provide the legal and systemic foundations for guiding the relationship between investment and environmental protection. In other words, integrating ecological considerations and sustainable development into the legal framework governing trade and investment would not only provide a means of protecting the environment and community rights but could also help reconfigure the conditions under which capital reproduces itself, opening up normative and practical opportunities to redirect trade dynamics toward more environmentally sustainable outcomes.

The strength of this research lies in its joint examination of two treaty chapters that the literature generally analyzes separately, and in its translation of IIPR reform proposals into normative couplings applicable to a specific treaty. Its limitations, however, are also evident: the analysis focuses exclusively on the treaty's institutional design rather than actual arbitration practice. Consequently, it does not examine specific arbitral awards and relies on four documentary sources, leaving aside other proposals currently under discussion.

Since Donald Trump began his second term in office, relations between Mexico and the United States have been marked by trade and security tensions, a situation that has persisted through March 2026. In this context, it seems unlikely that any review of the

USMCA conducted during Donald J. Trump's second administration would incorporate provisions strengthening states' right to regulate, promoting environmental protection, or reducing investment protections, as proposed in this article. Nevertheless, it is important to recognize that renegotiation of the treaty will remain a recurring issue in the years ahead. Analysts must therefore continue to focus on matters of critical importance to the region and remain mindful that the sustainable development agenda continues to advance globally despite the challenges posed by the second Trump administration.

Finally, states, particularly those in developing countries, may choose not to use existing legal instruments for political reasons, such as fears of discouraging foreign investment or the perceived need to remain competitive with other countries in attracting major investment projects. Although these and other instruments of the international legal order have been questioned in recent years regarding their legitimacy, scope, structures, and potential, this legal framework remains an important platform for socio-environmental transformation.

In this regard, the article's central conclusion presents a twofold provocation. The first suggests that incorporating sustainable development concepts into a trade treaty or an investment agreement between states may ultimately allow capital to define nature on its own terms, seeking to manage contradictions in ways that serve its interests. The second provocation, responding to the first, suggests that this same integration, even when undertaken on capital's terms, could create possibilities and opportunities for establishing sustainable development principles and practices over the long term, oriented toward greater social and environmental justice. It is precisely within this tension that the proposals presented in this article are situated.

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Article notes

1. Translated by the author. Original text: "...by relegating impacted third parties to 'amicus' status, rather than a party to the case, the process denies other rights-holders access to an effective remedy. Cumulatively, these privileges deny the equality of arms required by IHRL [international human rights law] for remedial processes."

2. Translated by the author. Original text: "...most BITs are vague with regard to what is legitimate, leaving little guidance for tribunals as to how to weigh competing state and investor interests and to what extent the state's interest should be scrutinized."

3. For a detailed analysis of the IIPR and the extractive industries, visit: <https://www.globalisdstracker.org/>

4. Translated by the author. Original text: "...among the top 20 most expensive awarded cases, the majority are related to fossil fuels."

5. It would be particularly interesting to examine the actual reasons that led these organizations to propose reforms. However, since this issue falls outside the scope of the present article, it is left as an open question.

6. See the official documents and materials of Working Group III, as well as specialized analyses identifying it as the principal multilateral forum for IIPR reform, at: https://uncitral.un.org/en/working_groups/3/investor-state

7. For details on the new rules, see: <https://icsid.worldbank.org/resources/rules-amendments>

8. Columbia Center on Sustainable Development, International Institute for Environment and Development, and International Institute for Sustainable Development.

9. G20 members: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russian Federation, Saudi Arabia, South Africa, Türkiye, United Kingdom, United States of America, African Union, and European Union. Invited countries (+): Angola, Chile, Colombia, Egypt, Netherlands, New Zealand, Nigeria, Norway, Paraguay, Peru, Portugal, Singapore, Spain, United Arab Emirates, and Uruguay. The 62 investment agreements analyzed among G20+ countries were signed between 2019 and 2024. See the list in Annex 1 of the document: https://unctad.org/system/files/official-document/unctad_oecd-2024-g20-iiias_en.pdf

Research data availability

The analysis is based on publicly available documentary sources: the official text of the USMCA, documents concerning reform of the international investment protection regime (UNCITRAL, UNCTAD, OECD, and ICSID), and official statistical records (ICSID, Mexico's Ministry of Economy, and UNCTAD). All sources are cited in the article's reference list and are publicly accessible.

Peer review comments

This article underwent an anonymous peer review process in accordance with the journal's editorial transparency policy. The reviewers, who participated anonymously in the process, consented to the publication of the comments they provided during the review.

Reviewer 1's Comments: First, I would like to congratulate the author(s) on their work. Taking into account the journal's methodological guidelines, I recommend improving certain aspects of the writing, as detailed in the attached document.

Reviewer 2's Comments: I recommend reviewing the writing and the application of APA standards (7th edition). I also suggest reorganizing the discussion and conclusions sections. A file containing detailed suggestions in the form of comments is attached.

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